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June 16, 2015

The Honorable Hannah-Beth Jackson  
State Capitol, Room 2032  
Sacramento, CA 94249

Re: AB 465

Dear Senator Jackson:

On behalf of the California Dispute Resolution Council, we request that AB 465 be amended so that a waiver will be presumed to be voluntary and knowing if the contract clearly provides that the employee has the right to opt out of that portion of the contract that requires the employee to waive the right to file a civil action. CDRC was organized in 1994 to advocate for fair, accessible, and effective alternate dispute resolution processes before the legislature, state administrative agencies, and the courts. The membership of CDRC consists of individual ADR neutrals, together with community dispute resolution organizations and providers of ADR services which, taken together, represent more than 15,000 mediators and arbitrators in California. CDRC positions do not represent the views of any individual member.

One of the guiding principles of CDRC is to oppose the practice of employers to require employees to enter involuntarily into arbitration agreements as a condition of employment. That is also the object of AB 465 and so CDRC supports the basic concept of the bill.

However, all employees should have the right of access to justice. An employee who has a claim that is worth less than \$200,000 probably will not have access to the court system because it is not economical for an attorney to prosecute a claim in court in that range. However, it might be economical to arbitrate such a claim because arbitration is cheaper (and also faster). Unfortunately, an employer probably will not voluntarily agree to arbitrate a claim under \$200,000 after it has arisen, knowing full well that the employee might not be able to find an attorney to bring the claim in court. As a consequence, AB 465, notwithstanding its salutary aim, will have the unintended consequence of denying many employees access to justice.

This problem can be cured by allowing for contracts which give the employee the right to opt out of the provision waiving the right to bring a civil action. The opt out provision would have to be prominently displayed in the contract, the employee should have a reasonable time to exercise the opt out (at least 30 days), the opt out should be in writing, and should provide that an employee shall not suffer any consequences by exercising the right to opt out, i.e., the employee would retain the right to earn wage increases, promotions, etc.

The advantage of our suggestion is that the employee, not the employer, will have the option to decide whether disputes should be arbitrated.

We propose therefore that the following language be added to subsection (c):

*If a contract prominently allows the employee to opt out of the provision requiring the waiver of the right to file a civil action and the employee is given a reasonable time to execute the opt out and does not lose any rights by executing the opt out, then the failure of the employee to execute the opt out in writing within the time provided shall be considered to be a knowing and voluntary waiver of the right to file a civil action.*

Even though the bill makes no mention of the word "arbitration", we believe that a court will find that it is preempted by the Federal Arbitration Act because the fact sheet that accompanies the bill clearly states that it is aimed at arbitration contracts. If a court finds that the bill is preempted, then nothing will have been gained by enactment of the bill. Although the bill would still be preempted if it contained the language that we have proposed, the consequences will not be as dire for two reasons. First, we believe that many employers will amend their contracts to contain an opt out provision and so the possibility of an attack on the legislation on grounds of preemption will be reduced. Second, even if a court would ultimately rule that the bill, as amended, is preempted, there is a strong likelihood that the existence of the bill will have caused many employers to include opt out provisions in their employee contracts. Thus, we would support the bill if amended in the way we are asking. We appreciate your consideration of our suggested amendment to the bill.

Sincerely,

Paul Dubow  
Chair, Legislation Committee